SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 189

ALVIN A. JACOBSEN, Administrator of the Estate of Alan A. Jacobsen, Deceased,

Petitioner,

vs.

INTERNATIONAL TRANSPORT, INC., E. E. WOLF, ALLIS-CHALMERS MFG. CO. and JACK M. BROWN, a/k/a JACK M. BROWN, SR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

The only question presented by this case is whether or not the conduct of a licensed physician acting under statutory authority as County Medical Examiner in taking possession of a body, and taking a blood sample according to usual medical techniques is to be considered an unreasonable search and seizure violative of the Fourth Amendment to the United States Constitution.

REASONS FOR REFUSING THE WRIT.

The opinion of the United States Court of Appeals for the Eighth Circuit handed down in this case, and included in Appendix A attached to the Petition for this Writ neither decides a Federal Question of any substance not previously determined by this Court, nor does it decide any question in a way that is not in accord with applicable decisions of this Court.

The decision of the Circuit Court is not in conflict with any decision of another Court of Appeals on the same matter, nor has it decided an important state or territorial question in any way in conflict with applicable state or territorial law.

The decision did not decide any question of federal law which has not been settled by this Court nor has it decided any federal question in conflict with any decision of this court.

This Court in two decisions has already set down the standard of taking blood tests as it relates to the Constitutional guarantees afforded by the Fourth Amendment of the United States Constitution. One decision is *Breithaupt* v. *Abram,* 352 U.S. 432, (1957). In that case this Court held that the taking of a blood test from an unconscious person did not violate any of the subject's constitutional rights. The issue in that case was whether or not a criminal conviction should be set aside. In the case at bar the issue is whether or not there was error in admitting the blood test in a civil action to recover damages for wrongful death. At page 435 of 352 U.S.

this Court distinguished other cases where it was held that taking the blood samples was violative of constitutional rights. This Court pointed out that it set aside the convictions in the prior cases because the method of taking the test "shocked the conscience" and was so "brutal" and "offensive" that it did not comport with traditional ideas of fair play and decency. They therefore found that the previous cases were offensive to the due process. However, in the *Breithaupt case,* supra., this court held that the method of taking the test was not such that would shock the conscience of the Court. The test in that case was taken at a hospital under the direction of a physician, according to good medical standards.

This is exactly what occurred in the case at bar. The blood test was taken at a hospital by a physician, the County Medical Examiner, and at page 53 of the record, Dr. Perkins testified as follows:

> "The techniques I used for withdrawing this blood sample were according to usual medical techniques. There was nothing done to the body in my presence, nor was there anything done to the body in withdrawing this blood which would in any way affect, in my opinion, the blood alcohol test that was run by the chemists."

Obviously, the withdrawing of the blood with a three inch needle directly from the heart of a dead man does not shock the conscience of the Court. This is standard medical practice. Nor was the withdrawing of this sample done with a filthy, contaminated needle as charged by the Petitioners. There is no evidence to support such an allegation, and the record is clear that such was not the case.

A properly selected jury also passed upon the issue of the validity of the test. If the jury had believed from all of the evidence in the record that the needle was filthy and contaminated as charged by the petitioners, we doubt very seriously if they would have given any credence to the result of the test. The only competent medical evidence in this record is that the test was taken according to usual medical techniques, and there was nothing done in the process of withdrawing the blood that would in any way affect the blood alcohol test that was run by the chemists.

This Court in 1966 again set down some standards that relate to the withdrawing of blood samples from intoxicated persons. This was the case of *Schmerber* v. *California,* 384 U.S. 757, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 decided June 20, 1966. In that case the blood sample was taken over the objections of the intoxicated person. This Court at page 759 of 384 U.S. held that there was no violation of a due process clause. At page 766 this Court held that the allegations there was an illegal search and seizure were not justified. The principles set down in that case were followed by the Circuit Court in deciding this case.

Petitioner states that both of the above cited cases, *Schmerber* and *Breithaupt,* are in conflict with the decision of the Court of Appeals which they seek to have reviewed. They attempt to distinguish the cases by saying that in *Schmerber* and *Breithaupt* the blood test was taken at the instance of a police officer. In the case at bar it was taken by the County Medical Examiner pursuant to Sec. 339.5 and Sec. 339.6 of the 1966 Code of Iowa, which authorizes the Medical Examiner to take charge

of the dead body and make inquiries regarding the cause and manner of death, and conduct an autopsy examination if advisable and in the public interest. There is no good reason for distinguishing the cases on this basis.

These respondents agree with the Circuit Court of Appeals where it said in its opinion, page 8a, Appendix A of the Petition, the following:

> "The blood was taken from a dead body by a licensed physician according to the usual medical technique acting under statutory authority given him as a County Medical Examiner to take possession of the body and conduct an autopsy. The power to conduct an autopsy would clearly include the right to extract the blood sample. Under the circumstances of this case, we hold that the search and seizure was not unreasonable. See *Schmerber* v. *California*, 384 U.S. 757, 766; *Breithaupt* v. *Abram*, 352 U.S. 432; *State* v *Findlay, Iowa*, 145 N.W. 2d 650; *Diener* v. *Mid American Coaches, Inc.*, Missouri, 378 S.W. 2d 509; *Davis* v. *Brooks Transport Company*, Del. 186 F. Supp. 366."

In deciding whether or not the search was reasonable under the circumstances of this case we are fortunate to have a decision from the District Court of Delaware entitled *Davis* v. *Brooks Transportation Company*, 186 F. Supp. 366. In that case blood samples were taken from three dead men and admitted into evidence. The court held that no constitutional rights were violated. At page 370 of 186 F. Supp., the court answers a contention made by the Appellant in this case. There it is said:

> "However, plaintiffs argue first that the evidence of drunkenness was illegally obtained because the blood tests were taken without the consent of the plaintiffs all of whom were dead and, accordingly,

their Constitutional rights were invaded. But this argument will not stand close examination. The Constitutional rights asserted by plaintiffs' intestates here were personal to the deceased alone. *Richards* v. *State,* Del. Sup. Ct. 1950, 6 Terry 573, 77 A. 2d 199; *Mumford* v. *Croft,* Del. Super 1952, 8 Terry 464, 93 A. 2d 506; *State* v. *Carter,* Del. Super. 1952, 8 Terry 147, 89 A. 2d 131. The rationale of the rule is stated in the comment on American Law Institute's Model Code of Evidence Rule 202):

> '* * * The object of the privilege is protection against punishment, not prevention of compulsory disclosure of criminal conduct. Hence when punishment for a given crime is made impossible, the privilege with reference to that crime ceases to exist.'

Here, the plaintiffs were dead. They could not be indicted and tried for drunken driving or intoxication. Thus, the privilege if any, had disappeared.

A number of cases are directly in point. Thus, in the following cases, the evidence of blood samples containing alcohol taken from the body of a deceased were admitted over objection. *Fretz* v. *Anderson,* Sup. Ct. Utah 1956, 5 Utah 2d 290, 300 P. 2d 642; *Hartman* v. *Harder,* Tex. Civ. App. 1959, 322 S.W. 2d 555.

There are also a number of decisions admitting evidence of blood containing alcohol taken from a person when unconscious upon the ground that the Constitutional privilege only extends to testimonial evidence. (For instance, see *Alexander* v. *State,* Crim. Ct. of Appeals of Okl. 1956, 305 P. 2d 572.) I express no opinion as to this theory for, in any event, it is clear from the authorities first cited that the plaintiffs' argument is without foundation."

We believe the analysis of the U. S. Court of Appeals, Eighth Circuit, in the case at bar which is found at 8a of Appendix A of the Petition is appropriate to the Petitioner's contentions. There the Court said:

> "The testimony in the present case establishes that the quantity of alcohol in the blood of a deceased person is not diminishd by elimination of alcohol through body functions as is the situation with a living person. Upon this basis Plaintiff asserts that emergency steps relied upon in cases such as *Schmerber* and *Findlay* are not here present as there is no danger that a reasonable delay to obtain a search warrant would affect the evidentiary value of the sample. The appropriate test is not whether it was reasonable to procure a search warrant but whether the search was reasonable under the existing circumstances. *United States* v. *Rabinowitz,* 339 U.S. 56; *Wright* v. *United States,* Eighth Circuit, ... F. 2d ....., (February 19, 1968)."

From the above it is clear that the Court of Appeals was not making a decision in conflict with *Rabinowitz, Schmerber or Breithaupt,* but was simply following those previous decisions.

CONCLUSION.

This case presents a question of fact that has already been decided by a duly impanelled jury. The decision in this case truly and accurately applies the proper guidelines previously pronounced by this Court as it concerns the withdrawing of blood samples in relationship to the Fourth Amendment of the United States Constitution. The decision of the District Court and the Circuit Court

of Appeals is in harmony with the previous pronouncements of this Court, and no good purpose would be served in having a hearing before this Court on the merits simply to review a fair, impartial and just decision of a duly impanelled jury.

Respectfully submitted,

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APPENDIX A

SECTION 339.5
1966 CODE OF IOWA

"339.5. Inquiry-report. Upon receipt of such notice the county medical examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, reduce his findings to writing on forms provided by the commissioner of public health for such purpose, and deliver the original of such form to the county attorney, retaining one copy for his own use, and forwarding another copy to the criminal investigation division of the state department of public safety.

For each such preliminary investigation, including the making of the required reports, the county medical examiner shall receive a fee of fifteen dollars, plus his actual expenses, to be paid by the county for which he is appointed."

SECTION 339.6
1966 CODE OF IOWA

"339.6. Autopsy. If, in the opinion of the county medical examiner, an autopsy examination is advisable and in the public interest, such autopsy shall be performed. The autopsy may be made by the county medical examiner or by such competent pathologist as he may designate. A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be made promptly and filed with the county medical examiner and in the office of the county attorney. Pertinent information embodied therein shall be furnished forthwith to the appropriate state department or agency by the county medical examiner."